Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

EDWIN R. BOWEN, WARDEN,

Petitioner,

v.

KEVIN RICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit's holding that the existence of an "exception" to the Illinois Post-Conviction Hearing Act's statute of limitations allows an untimely filing to be considered "properly filed" under the AEDPA conflicts with the intent and purpose of the AEDPA and this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000)?

2. Whether the Seventh Circuit's inquiry into whether a collateral petition in state court has been "properly filed" for tolling purposes under the AEDPA is in conflict with the rule set forth by this Court in *Harris v. Reed*, 489 U.S. 255 (1989)?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Edwin Bowen, respectfully requests that this Court issue a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on June 28, 2001.

OPINION BELOW

The June 28, 2001 decision of the United States Court of Appeals for the Seventh Circuit is published as *Rice v. Bowen*, ___ F.3d ___ (7th Cir. 2001), 2001 U.S.App.LEXIS 14842, which is reprinted in the appendix to this petition. The August 2, 2001 order denying Rice's Petition for Rehearing with Suggestion for Rehearing *En Banc* is reported at 2001 U.S.App.LEXIS 18484 (7th Cir. Aug. 2, 2001), and is also reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on June 28, 2001, and rehearing was denied on August 2, 2001. Jurisdiction in this Court is proper under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The United States District Court for the Northern District of Illinois asserted jurisdiction in this case pursuant to 28 U.S.C. §2254, and the United States Court of Appeals for the Seventh Circuit asserted jurisdiction under 28 U.S.C. §§1291 and 2253.

In 1992, a jury in the Circuit Court of Cook County, Illinois convicted petitioner Kevin Rice ("Rice") of possession with intent to deliver a controlled substance, and the trial court thereafter sentenced him to a prison term of 20 years. The Illinois Appellate Court, First District, reversed the conviction, however, after finding a violation of *Chambers v. Mississippi*, 410 U.S. 284 (1973), and ordered a new trial. *People v. Rice*, 247 Ill.App.3d 415, 617 N.E.2d 360 (1st Dist. 1993). The State appealed, and the Illinois Supreme Court reversed the Appellate Court's adjudication of the *Chambers* issue and remanded for consideration of Rice's remaining claims. *People v. Rice*, 166 Ill.2d 35, 651 N.E.2d 1083 (1995). On remand, the appellate court affirmed the remaining issues. *People v. Rice*, 286 Ill.App.3d 394, 675 N.E.2d 944 (1st Dist. 1996). On June 4, 1997, the Illinois Supreme Court denied Rice's petition for leave to appeal. Rice did not file a petition for writ of *certiorari* in this Court.

While his direct appeal wound its way through the state courts, Rice commenced a post-conviction attack in the Circuit Court of Cook County, pursuant to the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1, *et seq.*), on September 12, 1996. On February 26, 1997, the trial court summarily dismissed the petition as frivolous and patently without merit pursuant to 725 ILCS 5/122-2.1 (allowing court's summary dismissal, and precluding input from state or further pleadings or argument from petitioner). Rice appealed, and on May 17, 1999, the Illinois Appellate Court, First District, affirmed, finding that the petition was both time-barred and without merit. The Illinois Supreme Court denied further review on October 6, 1999.

On June 30, 2000, Rice, represented by counsel, filed a petition for writ of habeas corpus pursuant to 28

U.S.C. §2254. On August 30, 2000, Edwin Bowen ("Bowen") moved to dismiss the petition as time-barred under the AEDPA's one-year statute of limitations. *See* 28 U.S.C. §2244(d)(1)(A). Bowen argued that because the appellate court determined that Rice's petition for post-conviction relief was untimely under state law, it was not "properly filed" for purposes of tolling the AEDPA's statute of limitations, as set forth in 28 U.S.C. §2244(d)(2). Bowen calculated that Rice's habeas petition was due no later than September 3, 1998, one year following the Illinois Supreme Court's decision to deny his petition for leave to appeal, plus 90 days within which he could have sought *certiorari* in this Court. The district court agreed, dismissed the petition on September 29, 2001, and declined to issue a certificate of appealability. *Rice v. Haws*, 2000 U.S.Dist.LEXIS 16425 (N.D.Ill. 2000). (Included in Appendix)

Rice asked the United States Court of Appeals for the Seventh Circuit for a certificate of appealability, and, on March 21, 2001, the Seventh Circuit obliged, finding in a summary order that the petition was not untimely and granting certification of the *Chambers* issue. Rice filed his brief on April 20, 2001, and cited to the trial transcripts, which were not a part of the record in the district court. Accordingly, on April 30, 2001, Bowen filed a Motion to Strike the brief. On June 28, 2001, the Seventh Circuit denied Bowen's motion to strike as moot, finding that the habeas petition was not time-barred. The Seventh Circuit held, in particular, that the existence of the statutory "lack of culpable negligence" exception to an untimely filed post-conviction petition required that the state courts consider the merits of the petition. The court found that because the state appellate court allegedly reviewed the merits raised in Rice's

post-conviction petition despite its untimely filing, it must be deemed "properly filed" for purposes of the AEDPA's tolling authority.

Furthermore, the Seventh Circuit rejected Bowen's view that the appellate court's alternative finding of untimeliness mandated a finding that the petition was not "properly filed," and was, therefore, insufficient for tolling under the AEDPA. The Seventh Circuit also held that the state trial court's summary finding that the petition was "frivolous" was also a merits determination. The court ordered that the dismissal entered by the district court be vacated, and the case was remanded for full review of the merits of the claims raised in the habeas petition. *Rice v. Bowen*, ___ F.3d ___ (7th Cir. 2001), 2001 U.S.App.LEXIS 14842. (Included in Appendix).

On July 11, 2001, Bowen sought rehearing and rehearing *en banc*. The petition was denied on August 2, 2001, and the mandate was entered on the same day. No judge in active service requested a vote thereon, and no judge from the original panel voted for rehearing. (Included in Appendix). On August 3, 2001, Bowen filed a motion for the court to recall its mandate and stay proceedings pending Bowen's petition for writ of *certiorari*. That motion was denied on August 9, 2001.

On September 7, 2001, the district court denied relief on the merits. *Rice v. Bowen*, 2001 U.S.Dist.LEXIS 14058 (N.D.Ill. 2001). This case is currently being briefed on the merits in the Seventh Circuit as *Rice v. Bowen*, No. 01-3500. On October 26, 2001, that court denied Bowen's Motion to Stay Proceedings pending resolution of this petition.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Seventh Circuit's Holding, That The Existence Of An Exception To The Illinois Post-Conviction Hearing Act's Statute of Limitations Allows An Untimely Filing To Be Considered "Properly Filed," Conflicts With The Intent And Purpose Of The AEDPA And This Court's Decision In *Artuz v. Bennett*, 531 U.S. 4 (2000).

As recounted above by Bowen, the Circuit Court of Cook County denied Rice's petition for post-conviction relief on the grounds that it was "frivolous and patently without merit." Rice appealed. The State, in its brief, argued that the petition was time-barred under the statute of limitations which governs filings under the Illinois Post-Conviction Hearing Act. 725 ILCS 5/122-1(c).[1] In his reply brief, Rice argued, for the first time, that his attorney rendered inaccurate advice regarding the applicable statute of limitations. The appellate court found that the petition was without merit, and, in an

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[1] A collateral petition must be dismissed within 90 days if the petition is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2). If the petition is not dismissed pursuant to that section, the trial court must order that the petition be docketed for further consideration. 725 ILCS 5/122-2.1(b). Within 30 days of docketing for further consideration, the State is obligated to file a responsive pleading. 725 ILCS 5/122-5. In the case at bar, the trial court dismissed Rice's petition on its own accord within 90 days of its filing, as required by Section 122-2.1(a)(2). Therefore, because the State did not have the opportunity to enter its own pleadings in the trial court, the time-bar defense was raised for the first time in the State's brief on appeal.

alternative holding, found that the petition was, in fact, barred by the applicable statute of limitations. In the district court, Bowen argued that the state court's determination that the petition was untimely meant that it was not "properly filed" for purposes of tolling the AEDPA.

Tolling the AEDPA's one-year limitations period is permissible as long as a petitioner has pending a "properly filed" application for post-conviction or other collateral review in state court. *See* 28 U.S.C. §2244(d)(2) ("time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection"). In *Artuz v. Bennett*, 531 U.S. 4 (2000), this Court held that a post-conviction petition is "filed" when "it is delivered to, and accepted by, the appropriate court officer for placement into the official record." *Artuz*, 531 U.S. at 8. An application "is *properly* filed when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz*, 531 U.S. at 8 (emphasis in original).

Whether a petition is "properly filed" is a separate question from whether "the claims *contained in the application* are meritorious and free of procedural bar." *Artuz*, 531 U.S. at 9 (emphasis in original). In other words, this Court noted the difference between statutes which govern conditions to filing, and statutes which govern the conditions to securing relief for the claims presented in the petition. As examples of conditions to filing, this Court listed "the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Artuz*, 531 U.S. at 8. A petition that does not comply

with this type of condition to filing is not "properly filed" under the AEDPA. However, a petition that does not comply with a condition to obtaining relief may, nevertheless, be considered "properly filed." *Artuz*, 531 U.S. at 9-10. The collateral petition in *Artuz* was "properly filed" because it was rejected by the state court not on a condition of filing, but, rather, on a condition of securing relief, inasmuch as the claims raised therein were either waived or *res judicata*. *Artuz*, 531 U.S. at 11.

The court below was likewise confronted with the question of whether the petitioner's post-conviction petition was "properly filed" in accordance with state law, and could, therefore, toll the AEDPA's statute of limitations. As noted, the Illinois trial court denied Rice's petition as "frivolous and patently without merit," and the appellate court, in affirming, determined that the petition was without merit and time-barred by the applicable statute of limitations. A finding of untimeliness has been categorized by this Court as one of several conditions to filing, which include "the form of the document, *the time limits upon its delivery*, the court and office in which it must be lodged, and the requisite filing fee." *Artuz*, 531 U.S. at 8 (emphasis added).

In maneuvering around the state court's clear and express application of the state statute of limitations (and, in doing so, summarily finding that the applicable state statute of limitations is merely a condition to obtaining relief, rather than a condition to filing), the Seventh Circuit reasoned that "Illinois provides a statutory exception to its post-conviction time limitation," and therefore "the state courts had to consider the merits of Rice's petition before determining whether it was timely." *Rice v. Bowen*, ___ F.3d ___, 2001 Ill.App.LEXIS 14842, at *9. Accordingly, the court found that Rice's

post-conviction petition was "properly filed," and that its filing, therefore, tolled the AEDPA. In reaching this conclusion, the Seventh Circuit referenced *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir. 2001), *Emerson v. Johnson*, 243 F.3d 931 (5th Cir. 2001), and *Smith v. Ward*, 209 F.3d 383 (5th Cir. 2000), all of which held that otherwise untimely or impermissible post-conviction petitions were "properly filed" for purposes of the AEDPA, even though they were untimely or not permitted by statute. *Dictado*, *Emerson*, and *Smith* premised their holdings on this Court's acknowledgment in *Artuz* that this Court expressed "no view on the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered." *Artuz*, 531 U.S. at 8, n.2.

In *Dictado*, there was no dispute that the collateral petition brought pursuant to Wa.Rev.Code §10.73.140 was untimely. *Dictado*, 244 F.3d at 727. However, because the statute contained exceptions to the statutory time limit "which require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed.'" *Dictado*, 244 F.3d at 728. The statute of limitations, rather than acting as a "condition to filing," served only as a "condition to obtaining relief," *Dictado*, 244 F.3d at 728, and the petitioner's personal restraint petition, as it was "properly filed," could toll the AEDPA.

In *Emerson*, the petitioner filed a motion to reconsider the dismissal of his state habeas corpus petition in the Texas Court of Criminal Appeals. This pleading, however, was barred by Tex.R.App.P. §213(b), which precluded unsuccessful petitioners from seeking rehearing or reconsideration following the dismissal of a state habeas corpus petition. However, the Fifth Circuit rec-

ognized that, on a number of occasions, Texas courts had entertained motions for reconsideration. *Emerson*, 243 F.3d at 934-935. Therefore, it could not be said that the motion for reconsideration filed in violation of the Texas rules of appellate procedure was not "properly filed." The petitioner's motion, as a result, tolled the AEDPA.

And, in *Smith*, the Fifth Circuit held that the Louisiana petitioner's untimely collateral petition was, nevertheless, "properly filed," because the applicable provision, LA.CODE CRIM. P. art. 930.8A, which imposed a three-year statute of limitations for filing such applications, allowed the state courts to consider the merits of the petition under certain circumstances. *Smith*, 209 F.3d at 385. Those exceptions involved such substantive determinations as a showing that "the facts upon which the claim is predicated were not known to the petitioner or his attorney," or that the petition raises a claim that is "based on a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law* * *." *Smith*, 209 F.3d at 385.

The statutes at issue in *Dictado*, *Emerson*, and *Smith*—inasmuch as their exceptions arguably mandate a review of the merits of the petitions notwithstanding apparent procedural deficiencies—provide a sharp contrast to the statute at issue in the case at bar. The Seventh Circuit's conclusion that, in order to find culpable negligence, the state reviewing court must necessarily conduct a review of the merits of the petition, utterly fails to defer to or respect the Illinois courts' interpretation of its own post-conviction statute, which, in habeas corpus, is a basic tenet of federalism. After all, the state courts are the ultimate expositors of state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (accepting as correct Maine's interpretation of its homicide law); *Gryger v.*

Burke, 334 U.S. 728, 731 (1948) (declining to embark on its own interpretation of a Pennsylvania sentencing statute for habitual criminals); *Coleman v. Ryan, et al.*, 196 F.3d 793, 799 (7th Cir. 1999) (refusing to conduct its own interpretation of the Illinois capital sentencing statute where the Illinois Supreme Court had already spoken on the issue).

The state law which the Seventh Circuit saw fit to interpret—the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1, *et seq.*—requires that a petition be filed not "more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of a sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner." 725 ILCS 5/122-1(c). The defendant has the burden to demonstrate that the delay in filing, if any, was not due to his culpable negligence. 725 ILCS 5/122-1(c). Accordingly, Rice was required to allege facts demonstrating that his delay in filing his post-conviction petition in the Circuit Court of Cook County was not due to his culpable negligence. In his post-conviction petition, Rice did not plead any facts in support of a "lack of culpable negligence" excuse; indeed, he did not even acknowledge, until he filed his reply brief on appeal, that the petition was filed outside of the statute of limitations.

While the Post-Conviction Hearing Act does contain the "lack of culpable negligence" exception to timely filing, the statute does not require, as the statutes at issue the Fifth and Ninth Circuits arguably do, that the reviewing court look to the underlying merit of the

claims raised in the petition in order to determine whether the lateness of the petition is due to the petitioner's culpable negligence. Rather, the courts must look solely to the tardy petitioner's excuse for late filing. The Illinois Appellate Court has suggested that the allegations of fact showing an absence of culpable negligence need not themselves be in the petition. *People v. Scullark*, ___ Ill.App.3d ___, ___ N.E.2d ___, 2001 Ill. App.LEXIS 134 (1st Dist. 2001). If the facts showing lack of culpable negligence need not appear in the petition itself, it follows that the reviewing court cannot possibly have recourse to examine the merits of the petition in its search for the statutory exception. Further, "the trial court is under no . . . obligation to search the record for a basis upon which to find an excuse for the late filing of a petitioner's post-conviction petition . . ." because "the petitioner bears the burden of establishing that his delay in filing a post-conviction petition was not the result of his own culpable negligence." *People v. Robinson*, ___ Ill.App.3d ___, ___ N.E.2d ___ (2nd Dist. 2001), 2001 Ill. App.LEXIS 706, *6. If the trial court has no obligation to "search the record," similarly it cannot be said that the court has recourse to "consider the merits of [the] petition before determining whether it was timely." *Rice*, 2001 Ill.App.LEXIS 14842, at *9. *See also People v. Lee*, 292 Ill.App.3d 941, 688 N.E.2d 673 (3rd Dist. 1997) (incorrect advice by counsel on direct appeal regarding post-conviction statute of limitations insufficient to escape culpable negligence; trial court's order dismissing petition as untimely affirmed); *People v. Rissley*, ___ Ill.2d ___, ___ N.E.2d ___ (2001), 2001 Ill.LEXIS 241, *13-15 (same; trial court's order denying State's motion to dismiss based on statute of limitations reversed).

Rissley is particularly relevant for exposing the error of the Seventh Circuit's analysis in this case. In *Rissley*, the petitioner raised a number of ineffective assistance of counsel claims related to trial counsel's performance in a late post-conviction petition. The trial court denied the State's motion to dismiss the petition as time-barred, but the State continued to assert that argument on appeal, and the petitioner continued to maintain that the delay in filing was not due to his culpable negligence. The Illinois Supreme Court disagreed, finding that petitioner had failed to make a showing that the delay in filing was not due to his culpable negligence. Under the Seventh Circuit's reasoning, the Illinois Supreme Court, in order to review the validity of the petitioner's culpable negligence argument, necessarily reviewed the substance of the underlying ineffective assistance claims themselves. Of course, the Illinois Supreme Court never did so: an examination into defendant's ability to plead facts showing a lack of culpable negligence is an entirely separate undertaking from reviewing a Sixth Amendment ineffective assistance of counsel claim. Not surprisingly, the Illinois Supreme Court majority opinion made no reference to the merits of any of the petitioner's substantive ineffective assistance claims. Indeed, the *Rissley* dissent is emphatic in its concern that defendant's underlying constitutional claims were not substantively addressed in light of the majority's finding that the statute of limitations had run and Rissley had not demonstrated that the delay was not due to his culpable negligence. *Rissley*, at *22 ("the majority analysis furnishes a convenient and superficial means of avoiding an eye-opening discussion of trial counsel's utter ineptitude.")

The ill effect of the Seventh Circuit's intrusion into the realm of Illinois law by means of this Court's *Artuz* foot-

note is just as apparent in the case at bar. In his reply brief on appeal from the denial of post-conviction relief, Rice argued that the "delay in filing his petition was not due to [his] culpable negligence, but rather to his attorney's mistake." *Rice v. Haws*, 2000 U.S.Dist.LEXIS 16425 (N.D.Ill. 2000), *7-8. Surely, the state appellate court did not have to review the merits of the substantive claims raised in the petition in order to determine whether the untimely filing should be excused in light of counsel's misinterpretation of Illinois law. In fact, it did not. While an Illinois petitioner who properly raises the "lack of culpable negligence" statutory exception may be entitled to an inquiry into whether the exception has been met, he is not entitled to the quite different inquiry into the merits of his untimely petition, especially where the statutory exception has nothing to do with the merits of the petition in the first place. The Seventh Circuit's holding that "the state courts had to consider the merits of Rice's petition before determining whether it was timely," *Rice*, 2001 Ill.App.LEXIS 14842, at *9, simply ignores the Illinois courts' interpretation of state law and exploits this Court's *Artuz* footnote to further dilute the AEDPA's statute of limitations.

In its *Rice* decision, the Seventh Circuit has established what one court has termed a "false comity:" an interpretation of §2244(d)(2) "that treats *all* untimely, successive, or abusive post-conviction relief applications as 'properly filed,' on the ground that state procedural rules *might* permit such applications, *if* certain conditions are met, but ignores a state court's determination that a specific post-conviction relief application is indeed procedurally barred." *Rouse v. Iowa*, 110 F.Supp.2d 1117, 1139 (N.D. Iowa 2000) (emphasis in original). This cannot be what was intended by Congress in its passage

of the AEDPA's tolling provision, nor can it be reconciled with *Artuz*, where this Court determined that a post-conviction petition is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings," including, in particular, the concern of timeliness. *Artuz*, 531 U.S. at 8. Nor can the Seventh Circuit's decision be read as a fair answer to this Court's query in footnote 2 in *Artuz*, as such an answer—that the mere existence of statutory exceptions to an untimely collateral petition should render it otherwise "properly filed," notwithstanding the state court's finding of untimeliness and notwithstanding the fact that the statutory exceptions may not even compel substantive review—would sound the death-knell for the AEDPA's statute of limitations.

The Seventh Circuit's opinion in *Rice*, and its complementary disregard for the Illinois courts' interpretation of Illinois Post-Conviction Hearing act, effectively turn federalism on its head by discouraging future habeas petitioners from diligently complying with state procedural rules in the post-conviction arena. The Seventh Circuit's opinion also further diminishes the potency of the AEDPA, which was intended to winnow out habeas applicants, like Rice, who fail to pursue diligently their state remedies in accordance with state law. Quite simply, the "statutory exception" referred to by this Court in footnote 2 of *Artuz* has been seized upon by the Seventh Circuit to further water-down the vitality of the AEDPA and its attendant concerns of comity, federalism, and deference to state court adjudications. The faulty and cursory reasoning behind the Seventh Circuit's decision in *Rice* is a clear indication that *certiorari* should be granted to clarify to what extent those statutory exceptions can confer "properly filed" status on collateral petitions that are otherwise untimely under state law.

II.

Certiorari Should Be Granted Because the Seventh Circuit's Decision Finding That State Post-Conviction Petition Was "Properly Filed" Is In Conflict With This Court's Decision In *Harris v. Reed*, 489 U.S. 255 (1989).

In the District Court, Bowen argued that, in light of the appellate court's equally dispositive finding that the petition was untimely, it was, therefore, not "properly filed" under the AEDPA as that clause was interpreted in *Artuz v. Bennett*, 531 U.S. 4 (2000), and could not toll the one-year statute of limitations for filing a timely habeas petition. 28 U.S.C. §2244(d)(2). While the District Court agreed with Bowen's argument and granted his motion to dismiss, the Seventh Circuit did not, as it disregarded the state appellate court's holding that Rice's petition for post-conviction relief was untimely because the state court's holding on untimeliness was "only" made in the alternative. *Rice v. Bowen*, ___ F.3d ___ (7th Cir. 2001), 2001 U.S.App.LEXIS 14842, *8.

The Seventh Circuit's view of the appellate court's timeliness inquiry constituted a blatant deviation from this Court's procedural default jurisprudence and requires further review. When a state court makes adjudications on both the merits and the procedural posture of a claim, federal review will be foreclosed and the default will control the future disposition of the claim in federal habeas court, as long as the state court's procedural ruling was "clearly and expressly" made. *Harris v. Reed*, 489 U.S. 255, 266 (1989). This rule is grounded in concerns of comity and federalism, which prevent a habeas petitioner whose "custody was supported by independent and adequate state grounds . . . a means to undermine

the State's interest in enforcing its laws." *Coleman v. Thompson*, 501 U.S. 729, 730-731 (1991).

Before its decision in *Rice*, the Seventh Circuit's extension of the *Harris* principle to the AEDPA's "properly filed" language was grounded in the dual concerns of comity and federalism, and was consistently applied. *See Freeman v. Page*, 208 F.3d 572, 574 (7th Cir. 2000) ("Whether a collateral attack is properly filed can be determined in a straightforward way by looking at how the state courts treated it"); *Fernandez v. Sternes*, 227 F.3d 977, 978 (7th Cir. 2000) (where state court offers alternative holdings on timeliness, *Harris* should guide any analysis in federal court because that case "provide[s] a straightforward way for identifying 'properly filed' petitions"); *Jefferson v. Welborn*, 222 F.3d 286, 288 (7th Cir. 2000) (same). As illustrated by the aforementioned cases, the Seventh Circuit was steadfast in its determination that a state court's finding of procedural deficiency will be dispositive not only in the procedural default context, but also when determining whether a petition for post-conviction relief has been "properly filed" under state law. In *Rice*, however, the Seventh Circuit neglected to follow the rule established by this Court in *Harris*, holding instead that the finding of untimeliness was made "only in the alternative," and could not, therefore, support Bowen's position that the post-conviction petition was not "properly filed" for purposes of tolling the AEDPA's statute of limitations. *Rice*, 2001 U.S.App.LEXIS 14842 at *8.

Not only was this decision contrary to the spirit of *Harris*, but it also disregarded this Court's unyielding admonition that the federal courts should honor findings of procedural non-compliance which are made by state courts pursuant to state law grounds. *See, e.g., Coleman*,

501 U.S. at 729. Upon application of *Harris* to the appellate court's treatment of Rice's petition for post-conviction relief, it is apparent that the petition was not "properly filed" for purposes of tolling the AEDPA's statute of limitations. Although the state appellate court initially considered the merits of Rice's claims, it nevertheless, in the end, determined that the original post-conviction petition was filed in violation of the state statute of limitations. In short, the court's initial holding on the merits, under *Harris*, matters very little in light of its eventual unambiguous, clear, and express determination that the petition was also time-barred. *Harris* makes equally clear that the state appellate court's procedural holding was dispositive for purposes of Rice's compliance with the AEDPA's "properly filed" requirement. Rice's post-conviction petition was not "properly filed" because the state appellate court, unambiguously relying on a state statute of limitations, determined that it was untimely, notwithstanding its contemporaneous holding that the petition was without merit.

If a state court's decision rests on both a procedural default and a lack of merit, then federal review is foreclosed, provided that the finding of default is clear. *Harris*, 489 U.S. at 264, n. 10. There is no rational reason why such a default rule should not also apply to a case such as Rice's, where the state reviewing court initially denied the appeal on the merits, and, in an equally compelling holding, concluded that the petition was time-barred under state law. The purpose of the rule of comity is to "reduce friction between the state and federal court systems by avoiding the 'unseemliness' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the

first instance." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). This same sort of "unseemliness" is equally apparent where a federal court ignores a state court's determination that a state petition for post-conviction relief does not comply with state procedural requirements, and holds instead that the application was "properly filed" for purposes of tolling the AEDPA.

The *Rice* court, instead of deferring to state law and, in turn, reducing the friction between state and federal courts, has enhanced that friction by disregarding the state appellate court's clear finding of untimeliness, and by allowing Rice to toll the AEDPA with that untimely pleading. The relentless movement toward deference to state court adjudications, whether procedural or substantive, is evident not only in Congress' passage of the AEDPA, but also in the pattern of this Court's habeas corpus jurisprudence. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000); *Ramdass v. Angelone*, 530 U.S. 156 (2000). Comity and federalism are the watchwords in this movement toward a more deferential view of state court adjudications. In the Seventh Circuit, such concerns are no longer paramount, inasmuch as that court has created needless confusion with respect to its inconsistent and incorrect application of *Harris* to the case at bar. Therefore, *certiorari* should be granted to clarify and enforce the applicability of *Harris*, and its attendant concerns of comity and federalism, to the "properly filed" requirement contained in 28 U.S.C. §2244(d)(2).

CONCLUSION

For the aforementioned reasons, Petitioner, Edwin Bowen, respectfully requests that this Court find that (1) the Seventh Circuit's conclusions regarding the utility of statutory exceptions to timely state collateral petitions are so contrary to federalism and the intent and purpose of the AEDPA's statute of limitations so as to compel the Court to grant *certiorari* either by plenary consideration or summary reversal; and (2) the Seventh Circuit's opinion strays so far from the principles of federalism in its disregard of the state appellate court's alternative finding that Rice's state post-conviction petition was untimely under state law that this Court must grant *certiorari* either by plenary consideration or summary reversal.

Respectfully submitted,

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